

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NICHOLAS R. AND MARIA L. NUZZI	:	DETERMINATION
	:	DTA NO. 815096
for Redetermination of a Deficiency or for	:	
Refund of NYS and NYC Income Taxes under	:	
Article 22 of the Tax Law and the NYC	:	
Administrative Code for the Years 1985 and 1986.	:	

Petitioners, Nicholas R. and Maria L. Nuzzi, 1009 Old Town Road, Coram, New York 11727, filed a petition for redetermination of a deficiency or for refund of NYS and NYC Income Taxes under Article 22 of the Tax Law and the NYC Administrative Code for the years 1985 and 1986.

The Division of Taxation ("Division"), by its representative, Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated October 9, 1996 seeking summary determination in this matter. Petitioners did not respond to the motion.

Upon consideration of the Division's motion papers and exhibits contained therein, including the affirmation dated October 9, 1996 of Peter T. Gumaer, Esq., and an affidavit dated October 9, 1996 of Charles Bellamy, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners are entitled to a refund of personal income taxes paid on Federal pension income, when their refund claim was not filed within three years of their filing tax returns for the years at issue.

FINDINGS OF FACT

1. During 1985 and 1986, petitioners received income from a Federal pension, and they timely filed New York State income tax returns for each of these years, on which they reported the Federal pension income as taxable to New York State.

2. According to the affidavit of Charles Bellamy, a tax technician, dated October 9, 1996, petitioners "failed to file refund claims or amended returns within three years of the filing of the original returns." According to Mr. Bellamy, petitioners filed a claim for refund for taxes paid on Federal pension income for the 1985 and 1986 tax years on September 23, 1994. Consequently, petitioners were issued a notice of disallowance for the 1985-86 tax years. The notice of disallowance for the years at issue was not included in the motion record.

3. Petitioners attached to their petition photocopies of various letters to them from the Division of Taxation ("Division"), including a Notice of Disallowance dated April 19, 1991 which rejected a refund claim for the tax year 1987. However, the tax year 1987 is not at issue in the matter at hand. Presumably, the other letters from the Division to petitioners, attached to the petition, which all predate September 23, 1994, the date on which the Division maintains petitioners filed a refund claim for 1985 and 1986, also regard the tax year 1987. It is observed that these other letters do not specifically reference a tax year.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of fact is present, and the motion may be denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (20 NYCRR 3000.9[b][1]). Petitioners, who did not respond to the Division's motion, have not shown facts sufficient to require a hearing on whether they filed a refund claim for 1985 and 1986 within three years of their filing tax returns for such years. The letters included with the petition, which appear to reference the tax year 1987, are irrelevant to the matter at hand. Moreover, based upon the affidavit of Charles Bellamy, it may be concluded that there is no issue of fact concerning petitioners' filing of a refund claim for 1985 and 1986 within three years of their filing tax returns for the years at issue.

B. The issue whether the statute of limitations for maintaining a refund claim bars a taxpayer from seeking a refund of New York income tax paid on Federal pension income has

been resolved recently by the Tax Appeals Tribunal. The Tribunal in Matter of Burkhardt (January 9, 1997) held that a Federal retiree who failed to file a timely claim for refund within the three-year statute of limitations for refund claims under Tax Law § 687 was not entitled to a refund of income tax paid on Federal pension income. The Tribunal observed:

"Tax Law § 683 provides for a general three-year period for the Division to issue an assessment to a taxpayer. Accordingly, we see no inequity in the current statutory scheme which limits a taxpayer to the same three-year period for the filing of a claim for refund" (Matter of Burkhardt, supra).

C. The Tax Appeals Tribunal in Matter of Jones, (January 9, 1997) issued simultaneously with its decision in Burkhardt, supra, further noted that New York's income tax refund procedures was a "constitutionally sound scheme which 'rectified any unconstitutional deprivation' (Harper v. Virginia Dept. of Taxation, 509 US 86, 125 L Ed 2d 74) while simultaneously respecting the State's fisc (McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 US 18, 110 L Ed 2d 17)".

Accordingly, in light of petitioners' failure to file refund claims within three years of the filing of tax returns for the years at issue, their petition is properly denied.

D. The petition of Nicholas R. and Maria L. Nuzzi is denied, and the Division's disallowance of petitioner's claims for refund for 1985 and 1986 is sustained.

DATED: Troy, New York
January 16, 1997

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE